Supreme Court, U.S.
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No. 93-1327

In The

Supreme Court of the United States

October Term, 1993

JERRY L. BRANCH, COLBY L. BRANCH, and VALENNA L. BRANCH BECKER,

Petitioners,

v.

DALE L. TUNNELL, Individually and as Special Agent of Bureau of Land Management,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF

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Several points made in respondent's brief in opposition are replied to as follows.

1. Respondent nowhere meets petitioners' point that the heightened pleading standard enunciated by the Ninth Circuit, and applied to the operative complaint in this action is contrary to the provisions of Rules 8 and 9, F.R. Civ. P. (West 1994), as argued by petitioners. Thus, it is conceded by respondent that, unless his argument that "the amended complaint . . . would have called for dismissal under any pleading standard[,]" Opp. Br. at 12, this Court both should grant the petition and reverse the court below.

The court below never ruled on the sufficiency, *vel non*, of the amended complaint, but ruled only that, based on the heightened pleading standard, the complaint was insufficient to state a claim on which relief could be granted. It would be inappropriate for this Court to reach and to decide an issue that was neither reached nor decided by the court below. In effect, respondent requests that this Court engage in the unwarranted fideism that, had the court below reached the issue of the sufficiency of the amended complaint and applied the correct, non-heightened pleading standard, it would have found the complaint insufficient. There is no basis for this contention. In fact, respondent admits this when he concedes that "[i]t is true that the court of appeals stated in passing that the complaint would have passed muster under 'the familiar standard of *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)'. . . . " Opp. Br. at 11. The court of appeals did not state this *in passing*, but held this to be the case in unequivocal terms. Respondent further attempts to attack this clear holding by the court below by stating that the

court's "own analysis casts serious doubt on the correctness of that conclusion." *Ibid.* Indeed, it is the court's holding. The holding is neither unfounded nor gratuitous. The fact that the clear holding undermines respondent's contention is not a proper basis for asserting the incorrectness of the contention. The court's holding renders respondent's contention baseless.

Since the court below clearly held that, but for the application of the heightened pleading standard, the operative complaint would have passed muster, the issue of heightened pleading, *vel non*, clearly is presented by, and should be ruled upon by this Court.

2. The allegation in the operative complaint that respondent "had included in his warrant affidavit information that he knew or should have known to be false[,]" Opp. Br. at 4, is sufficient to state a claim, and it does state a claim but for the heightened pleading requirement imposed by the court below. The court of appeals says so, and not in the passing fashion in which respondent characterizes it.

3. Respondent argues that the district court found that

> Donnelly's deposition testimony when considered as a whole, does not tend to show that Tunnell misrepresented, in the text of his affidavit, the substance of the information that Donnelly provided him. There exists no indication that the conclusions drawn by Tunnell upon his consideration of that information together with his review of pertinent documentation were false[,]

Opp. Br. at 7, and that therefore, the amended complaint failed to state a claim on which relief could be granted. This is true, but the conclusion that respondent suggests follows from this finding does not follow: to wit, that therefore, the complaint would not state a claim for relief under a non-heightened pleading standard.

In fact, it is this very finding on which the district court based its conclusion that "the complaint failed to alleged facts tending to show that respondent was aware, or should have been aware of the[ ] falsity [of the contents of his affidavit]." *Ibid.* But, this was under the heightened pleading standard here under attack.

It is *only under the heightened pleading standard* that petitioner was required to "allege facts tending to show that respondent was aware, or should have been aware, of their falsity." *Ibid.* This issue was not before the court of appeals because it applied *only* the heightened pleading standard and did not review directly this finding by the district court. In fact, when it reviewed the sufficiency of the pleading as a whole, it found that it "would have passed muster under 'the familiar standard . . . . ' " Thus, the citation to the district court's finding on this issue both is inappropriate and does not support respondent's contention because, notwithstanding the district court's finding, the court of appeals found that the amended complaint *would have* passed muster but for the application of the heightened pleading standard.

4. Respondent argues that "Petitioner . . . has failed to identify any respect in which a lower pleading standard would have affected the outcome of this case." Opp. Br. at 9. This argument is a fallacious *petitio principii*

because it contains the incorrect suppressed premise that petitioners need to have identified that which respondent claims is absent. In fact, on the record of this case it is true that petitioners both need not identify that which respondent contends is missing, and that the court of appeals' conclusion that "the complaint would have passed muster under 'the familiar standard [of pleading] . . . ," Opp. Br. at 11, is conclusive on this issue. It is not the function of this Court to, for itself, and on the alleged record before it, delve into the actual amended pleading, and this Court should defer to the court of appeals' finding on this issue.

5. Respondent's contention that this case does not present for review any issue of general importance, *ibid.*, is palpably and seriously incorrect. At a very minimum, it presents the issue of whether, *vel non*, a court of appeals is free to depart totally from clear and express rules of procedure in a class of cases that is abundant in the federal courts. At maximum, the petition presents the issue of whether, *vel non*, an entire class of civil rights actions will be thrown out of the federal court system based on a court-written rule that is wholly inconsistent with a governing rule of general application, and in circumstances in which the court of appeals states that it was invited to do so by this Court.

The fact that there is no conflict among the various circuits is of no moment, and a decision of this important and recurring issue by this Court now will staunch a flood of litigation on this issue that unquestionably will

give rise to a conflict among the various circuits. Preventive law is not a terribly bad idea.

CONCLUSION

The amended complaint was dismissed only because of the heightened pleading standard, and it is both important and appropriate for this Court to decide the issue of whether or not heightened pleading is appropriate in Section 1983 or *Bivens* actions that are not covered by the *Leatherman* rule.

The petition for a writ of certiorari is well-taken and should be granted.

Respectfully submitted,

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